

>> ALL RISE.

HEAR YE, HEAR YE, HEAR YE, THE  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.

ALL WHO HAVE CAUSE TO PLEA, DRAW  
NEAR.

GIVE ATTENTION, YOU SHALL BE  
HEARD.

GOD SAVE THESE UNITED STATES,  
THE GREAT STATE OF FLORIDA AND  
THIS HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE  
SUPREME COURT OF FLORIDA.  
PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO  
THE FLORIDA SUPREME COURT.  
THE FIRST CASE ON TODAY'S DOCKET  
IS FRIED V. THE STATE OF  
FLORIDA.

COUNSEL?

>> GOOD MORNING.

MAY IT PLEASE THE COURT, EDWARD  
GUEDES ON BEHALF OF THE  
PETITIONERS.

WITH ME AT COUNSEL ABLE IS JAMIE  
COLE.

THIS CASE PRESENTS TWO  
FUNDAMENTAL QUESTIONS FOR THE  
COURT.

FIRST, WHETHER THE FLORIDA  
CONSTITUTION IMPOSES REAL  
LIMITATIONS ON THE POWER OF THE  
JUDICIARY OR WHETHER THE  
LEGISLATURE MAY SIMPLY MODIFY  
THOSE POWERS WHEN IT SEES FIT.

AND SECOND, WHETHER  
REPRESENTATIVE DEMOCRACY AT THE  
LOCAL LEVEL IS FECKLESS.

WE RESPECTFULLY SUGGEST THE  
ANSWER TO THE FIRST QUESTION IS  
THAT THE FLORIDA CONSTITUTION  
IMPOSES UNAVOIDABLE AND  
INESCAPABLE LIMITS ON POWER OF  
THE JUDICIARY.

AND WITH RESPECT TO THE SECOND,  
THAT LOCAL DEMOCRACY MUST BE  
ALLOWED TO SURVIVE IN OUR CITIES  
AND OUR COUNTIES EVEN AT THE  
EXPENSE OF SOME STATE THE  
LEGISLATIVE FRUSTRATION.

I'LL ADDRESS THESE TWO BROADER  
QUESTIONS IN THE CONTEXT, FIRST,  
OF LEGISLATIVE IMMUNITY AND,

SECONDLY, IN THE GOVERNMENTAL  
FUNCTION IMMUNITY.

AS A MATTER OF MORE THAN TWO  
CENTURIES OF AMERICAN HISTORY  
AND TRADITION, THE JUDICIARY HAS  
NEVER HAD THE AUTHORITY TO  
INQUIRE INTO THE MOTIVATIONS OR  
INTENTIONS OF INDIVIDUAL  
LEGISLATORS ACTING IN THEIR  
LEGISLATIVE CAPACITY.

THAT LIES AT THE HEART OF  
LEGISLATIVE IMMUNITY.

AND, IN FACT, THIS COURT AND THE  
UNITED STATES SUPREME COURT HAVE  
BOTH DESCRIBED THIS PRINCIPLE AS  
A CORNERSTONE OF AMERICAN  
DEMOCRACY.

AND YET IN THIS CASE THE FIRST  
DISTRICT'S DECISION ENDORSES THE  
IDEA THAT THE LEGISLATURE MAY  
EXPAND THE CONSTITUTIONALLY  
RESTRICTED AUTHORITY OF THE  
JUDICIARY TO ENGAGE IN SUCH AN  
INQUIRY AND HOLD LEGISLATORS  
LIABLE FOR VOTING.

IN BOGDEN THE SUPREME COURT  
UNANIMOUSLY STATED WHERE THE  
OFFICERS OF A MUNICIPAL  
CORPORATION ARE INVESTED WITH  
LEGISLATIVE POWERS, THEY ARE  
EXEMPT FROM INDIVIDUAL LIABILITY  
FOR THE PASSAGE OF ANY ORDINANCE  
WITHIN THEIR AUTHORITY, AND  
THEIR MOTIVES IN REFERENCE  
THERE TO THE WILL NOT BE INQUIRED  
INTO.

IF THE FIRST DISTRICT'S DECISION  
ON THIS POINT IS ALLOWED TO  
STAND, IF THE LEGISLATURE IS  
ALLOWED TO EXPAND OR ADJUST THE  
POWERS OF EITHER OF THE OTHER  
BRANCHES IN ORDER TO PUNISH  
LOCAL ELECTED OFFICIALS, THEN  
OUR THREE-BRANCH FORM OF  
GOVERNMENT ESSENTIALLY BECOMES A  
SINGLE ALL-POWERFUL BRANCH.

>> COULD I ASK YOU TO CONNECT  
THOSE DOTS A LITTLE BIT?  
BECAUSE I FOLLOWED YOU UP UNTIL  
WHERE YOU SAID THAT NO ONE CAN  
INQUIRE TO THE MOTIVES OF THESE  
LEGISLATORS.

AND HEN THE NEXT SENTENCE IS  
ABOUT PENALTY, NOT ABOUT

INQUIRING TO THE MOTIVES.

AND AS I UNDERSTAND IT, THE  
DELIBERATIVE PRIVILEGE, IT  
PROTECTS -- NOT A PARTICULAR  
ABSENCE OF THE CONSEQUENCE, THE  
LEGISLATIVE DECISION.

CAN YOU CONNECT THOSE TWO DOTS  
ABOUT WHY A PENALTY CONSTITUTES  
AN IMPERMISSIBLE INTRUSION INTO  
THE MOTIVES AND DELIBERATIONS OF  
A LEGISLATOR?

>> CERTAINLY, JUSTICE COURIEL.  
AS JUSTICE THOMAS WROTE FOR THE  
U.S. SUPPORT IN BOGDEN IN  
EXPLAINING THE FUNDAMENTAL  
NECESSITY FOR LEGISLATIVE THE  
IMMUNITY IS TO PRESERVE THE  
INDEPENDENCE OF LOCAL  
LEGISLATORS.

BECAUSE ABSENT THAT IF WITH  
EVERY VOTE A LEGISLATOR CAN BE  
HAULED INTO COURT AND ASKED WHY  
DID YOU VOTE --

>> WHO'S ASKED THAT?

WHERE IN THE STATUTE DO WE HAVE  
THAT INQUIRY GOING ON?

I AGREE THAT WOULD BE  
PROBLEMATIC.

I'M HAVING A HARD TIME  
CONNECTING THE DOTS BETWEEN WHAT  
THE STATUTE SAYS THE LEGISLATURE  
HAS GIVEN ITSELF THE POWER TO  
SEEK, AND THAT INQUIRY THAT YOU  
JUST STATED INQUIRING INTO THE  
MOTIVES OF A LEGISLATOR?

WHY IS THE MOTIVE OF A  
LEGISLATOR RELEVANT?

>> I AGREE THAT IT'S NOT THE  
RELEVANT, BUT SECTION 3C OF  
790.33 REQUIRES THAT THE  
IMPOSITION OF A FINE OF THE  
PENALTY ON AN INDIVIDUAL LOCAL  
LEGISLATOR BE MADE AFTER THE  
COURT MAKES A DETERMINATION THAT  
THE VIOLATION WAS KNOWING OR  
WILLFUL.

AND I'M NOT QUITE CERTAIN HOW AN  
INDIVIDUAL FINE COULD EVER BE  
IMPOSED FOR KNOWING AND WILLFUL  
CONDUCT WITHOUT INQUIRING INTO  
THE MOTIVATIONS OR  
PROCESSES, LEGISLATIVE PROCESSES  
OF AN INDIVIDUAL LEGISLATOR.

>> DON'T WE DO THAT ALL THE TIME

THOUGH?

IF, I MEAN, MOTIVE IS NOT AN  
ELEMENT IN A CRIMINAL CASE,  
RIGHT?

ALL WE FIND IS --

>> SOME DO.

>> OKAY.

BY AND LARGE, IF WE'VE  
ESTABLISHED THAT THE AN ACTUS  
REUS WAS COMMITTED WITH A MENS  
REA IF IT WAS VOLUNTARY, THAT IS  
GENERALLY ENOUGH TO SAY THAT IT  
WAS CULPABLE.

IT DOES SORT OF START TO CONNECT  
THE DOTS, BUT THEN THE PROBLEM  
IS, YOU KNOW, I DON'T KNOW THAT  
THE LEGISLATURE HAS CONTEMPLATED  
HERE A FREE WILLING INQUIRY INTO  
THE MOTIVATIONS OF THE  
LEGISLATORS.

IT HAS INSTEAD JUST PRESCRIBED A  
PENALTY FOR CERTAIN ACTS.

AND IF I'M INCLINED TO AGREE  
WITH YOU THAT PROBING INTO THE  
MOTIVATIONS AND THE INTERNAL  
THOUGHT PROCESSES OF THE  
LEGISLATURE'S CONSTITUTIONALLY  
PROBLEMATIC FOR THE SEPARATION  
OF POWERS, I'M NOT SURE HOW THAT  
CARRIES THE DAY.

I'M NOT SURE WHY THAT'S THE  
BASKET YOU'RE PUTTING YOUR EGGS  
INTO.

>> WELL, IT'S -- IN THIS  
PARTICULAR -- THE LEGISLATURE  
CHOSE THE LANGUAGE IT CHOSE WHEN  
IT CREATED THIS REMEDY OR  
PENALTY.

IT CHOSE TO INCLUDE SOME INTENT  
COMPONENT INTO THIS.  
CONCEIVABLY, THE LEGISLATURE HAD  
SIMPLY SAID IF THERE'S A  
PREEMPTION, ANY LOCAL LEGISLATOR  
WHO VOTED IN FAVOR AUTOMATICALLY  
GETS FINED.

>> WHAT ABOUT THIS?

AND THIS IS, OF COURSE, A MATTER  
THAT THE PARTIES HAVE BRIEFED  
EXTENSIVELY, BUT I'M CURIOUS,  
YOU KNOW?

LET'S SAY THEY CUT IT ALL THE  
WAY DOWN, ALL COUNTY GOVERNMENTS  
ARE HEREBY PREEMPTED.  
THERE SHALL BE NO COUNTY

GOVERNMENT OR, RATHER, THERE WILL BE 60 COUNTY GOVERNMENTS INSTEAD OF 67.

DO YOU AGREE THAT THE CONSTITUTION DOESN'T STOP THAT, RIGHT?

THAT'S NOT AN INFRINGEMENT ON THE DELIBERATIVE PROCESS OF ANY LEGISLATOR, RIGHT?

>> IF AND WHEN THE LEGISLATURE CHOOSES TO ABOLISH ANY PARTICULAR LOCAL GOVERNMENT, THEN OBVIOUSLY THE COURTS CAN ADDRESS THE CONSEQUENCES OF HAVING DONE SO.

>> WELL, BUT, YEAH.

BUT --

>> AS LONG AS THEY HAVEN'T --

>> WHAT I'M STRUGGLING WITH IS THE CONSEQUENCES FOR YOUR ARGUMENT, RIGHT?

YOUR ARGUMENT IS THAT IT IS AN INFRINGEMENT ON THESE LEGISLATIVE PREROGATIVES SECURING THE SEPARATION OF POWERS THAT THE LEGISLATURE NOT THE ADOPT THESE PENALTIES.

AND WHAT I'M SAYING TO YOU IS IF YOU CONCEDE THAT THE ULTIMATE PENALTY, A PUNISHMENT OF THE LOCAL GOVERNMENT WOULD NOT REQUIRE INQUIRY INTO THE MOTIVES OF ANYONE, ISN'T THAT A REAL PROBLEM FOR YOUR ARGUMENT?

>> I DON'T THINK SO, YOUR HONOR, BECAUSE IT CREATES TWO DIFFERENT PROBLEMS, ADMITTEDLY.

THE ABOLISHMENT OF A LOCAL GOVERNMENT CREATES ITS OWN SET OF PROBLEMS, BUT IF YOU'RE GOING TO HAVE A LOCAL FORM OF GOVERNMENT WHERE THE CITIZENS OF FLORIDA VOTE WITH THE EXPECTATION THAT THEIR VOTE HAS SOME DEMOCRATIC CONSEQUENCE BECAUSE THEY ARE ELECTING INDIVIDUALS TO REPRESENT THEIR INTERESTS AND THE FLORIDA CONSTITUTION CONFERS ON THOSE INDIVIDUALS LEGISLATIVE POWER TO PERFORM THEIR DUTIES, THEN TO PULL THE RUG OUT, SO TO SPEAK, FROM THOSE LOCAL LEGISLATORS BY SAYING, WELL, YOU CAN DO THAT

BUT IF YOU DO THAT AND WE DON'T AGREE WITH YOU OR YOU TAKE THE POSITION THAT WE'VE DETERMINED IS NOT A PERMISSIBLE ONE, THEN WE'RE GOING TO PUNISH YOU INDIVIDUALLY JUST FOR HOW YOU VOTED.

AND IN A COMPLETELY DIFFERENT WAY, THAT UNDERMINES DEMOCRACY.

>> WELL, BUT OUR CONSTITUTION SAYS THAT WITH RESPECT TO MUNICIPALITIES, THAT THE MUNICIPALITIES MAY ADMINISTER ANY POWER EXCEPT AS OTHERWISE PROVIDED BY LAW.

>> CORRECT, YOUR HONOR.

>> AND, I MEAN, OUR CASES ARE VERY CLEAR ABOUT THE SUPERIORITY OF THE LEGISLATIVE POWER IN THIS ARENA.

AM I WRONG ABOUT THAT?

>> YOU ARE NOT WRONG, CHIEF JUSTICE CANADY.

>> THAT'S WHY THIS WHOLE CASE IS KIND OF MYSTIFYING TO ME BECAUSE WITH UNDERLYING WHAT THE LEGISLATURE HAS DONE IS THIS EXPRESS CONSTITUTIONAL PROVISION.

>> WE HAVE NEVER DISPUTED --  
>> WELL, IT WOULD BE HARD TO DISPUTE IT.

>> WELL, AND WE HAVE NEVER DISPUTED IT, YOUR HONOR, THAT THE LEGISLATURE HAS THE ULTIMATE ABILITY TO PREEMPT A SUBSTANTIVE AREA OF THE LAW.

BUT IT GOES FARTHER IN THIS INSTANCE BECAUSE OBVIOUSLY THE LEGISLATURE ISN'T SAYING SIMPLY DON'T LEGISLATE IN THIS FIELD, DON'T LEGISLATE WITH RESPECT TO FIREARMS AND AMMUNITION BECAUSE WE PREEMPTED IT, AND YOU CAN'T ENACT THAT.

WE GET THAT.

BUT THEN WHAT HAPPENS IS IN A SCENARIO SUCH AS THIS STATUTE WHERE, IN FACT, SECTION 790.33 OPENS THE DOOR TO LOCAL LEGISLATORS TO LEGISLATE IN CERTAIN AREAS RELATING TO FIREARMS AND THEN IT SAYS, WELL, IF YOU DO SO -- AND, BY THE WAY,

YOU CAN'T DO IT RIGHT, ELECTED OFFICIAL, WE'RE GOING TO PUNISH YOU, WE'RE GOING TO PUNISH YOU WITH A FINE THAT TARGETS YOU INDIVIDUALLY, THAT TAKES AWAY YOUR ABILITY TO HAVE THE DEFENSE PAID FOR BY THE LOCAL GOVERNMENT THAT EXPOSES YOU AND ESSENTIALLY SAYS DON'T YOU DARE VOTE EVEN THOUGH THE STATUTE SAYS YOU MAY AND THE CONSTITUTION SAYS YOU MAY, DON'T YOU DARE VOTE. AND HISTORICALLY, YOUR HONOR, THIS ISSUE COMES UP MANY, MANY TIMES.

THE REMEDY FOR A PREEMPTED ORDINANCE IS A LEGAL ACTION TO DECLARE IT, PREEMPT IT UNCONSTITUTIONAL AND UNENFORCEABLE.

BUT THIS GOES A STEP THE FURTHER, AND IT SAYS IF YOU VOTED KNOWINGLY OR WILLFULLY, WHATEVER THAT MAY MEAN, THEN THERE ARE ADDITIONAL CONSEQUENCES TO MERE PREEMPTION.

THERE ARE THE PUNISHMENTS. AND THAT'S WHERE I THINK THE PROBLEM TRANSGRESSES.

NO QUESTION, THERE IS NO QUESTION UNDERLYING ALL OF THIS IS THE NOTION OF THE PREEMINENCE OF THE STATE LEGISLATURE TO PREEMPT SUBSTANTIVE AREAS OF LAW.

WE DON'T DISPUTE THAT.

BUT THIS IS, THIS IS A FIRE, THIS IS A LEGISLATIVE FIRE HOSE TO PUT OUT A BIRTHDAY CANDLE.

>> WHAT ARE WE TALKING ABOUT HERE, THE LEGISLATURE'S ABILITY TO CHANGE SUBSTANTIVE LAW?

>> CORRECT.

>> I MEAN, THAT'S COMPLETELY VESTED IN THE LEGISLATURE.

>> AND THEY HAVE, THEY'VE CHANGED THE SUBSTANCE IN LAW.

>> UNDER GOVERNMENTAL IMMUNITY OR LEGISLATIVE IMMUNITY, WHATEVER, IT'S A SUBSTANTIVE LAW ISSUE, CORRECT?

>> I DON'T BELIEVE SO.

LEGISLATIVE IMMUNITY --

>> IT DERIVES FROM THE COMMON

LAW.

THE IMMUNITIES YOU CITED DERIVE FROM THE COMMON LAW.

>> THE LEGISLATIVE IMMUNITY HISTORICALLY HAS DERIVED FROM THE COMMON LAW, BUT IN THE STATE OF FLORIDA IT IS ALSO TETHERED TO THE CONSTITUTION BY VIRTUE OF THE CONFERENCE OF LEGISLATIVE POWERS ON.

>> YEAH, BUT AS THE CASE LAW SAYS, THE CONSTITUTION CONFERS THE LEGISLATIVE POWER IN THE STATE LEGISLATURE.

IT'S VERY CLEAR IN --

>> RIGHT.

BUT THEY COEXIST.

YOU DON'T, I MEAN, LEGISLATURE DOESN'T GET TO IGNORE ONE TO ACHIEVE ANOTHER ONE, TO COMPLY WITH ANOTHER ONE.

YOU CAN'T SUDDENLY SAY YOU'RE GOING TO BE A LEGISLATOR, A LOCAL LEGISLATOR, BUT YOU'RE NOT DOING OF ANY -- YOU CAN'T LEGISLATE OR YOU HAVE NO IMMUNITIES FOR ENGAGING IN LEGISLATION.

THAT'S WHERE THE PROBLEM LIES.

IF -- I'M TRYING TO HYPOTHESIZE A SCENARIO WHERE IT'S NOT PROBLEMATIC, BUT THE IDEA THAT YOU CAN HAVE CONSTITUTIONAL HORSE TO LEGISLATE AND NOT BE PROTECTED BY LEGISLATIVE IMMUNITY IS CONTRARY, CERTAINLY CONTRARY TO BOGDEN BECAUSE THAT'S WHAT THE SUPREME COURT SAID IN BOGDEN.

IF YOU'VE GOT THAT POWER, THEN YOU HAVE LEGISLATIVE IMMUNITY. SO PRESIDENT LEGISLATURE WANTS TO UNDO THAT AND HAVE GREATER CONTROL OVER LEGISLATORS AT THE LOCAL LEVEL, WELL, THEY CAN GO THROUGH THE PROCESS OF AMENDING THE CONSTITUTION, HE CAN TAKE AWAY THAT PROVISION OF THE CONSTITUTION THAT SAYS THAT YOU HAVE LEGISLATIVE THE POWERS AND PUT IT IN A STATUTE.

A STATUTE OVER WHICH THEY HAVE PLENARY CONTROL.

>> WHICH PROVISION YOU TALKING

ABOUT?

>> ARTICLE VIII, SECTIONS ONE AND TWO THAT GIVE EXPRESS LEGISLATIVE POWERS TO LOCAL LEGISLATORS.

NOW, THAT'S A STRUCTURE, AND THIS IS WHAT THE TRIAL COURT ORIGINALLY CONCLUDED, THAT THAT CONSTITUTIONAL STRUCTURE IS BEYOND THE POWER OF THE LEGISLATURE TO CHANGE THROUGH A STATUTE.

THERE MAY BE OTHER MECHANISMS, BUT THROUGH A STATUTE THEY CAN'T ALTER IT.

>> ARTICLE VIII, SECTION WHAT?

>> ARTICLE VIII, SECTION 1 WHICH DEALS WITH COUNTIES, AND ARTICLE VIII, SECTION 2 WHICH DEALS WITH MUNICIPALITIES.

>> SECTION 5B IT SAYS EACH COUNTY SHALL HAVE THE HORSE TO REQUIRE A CRIMINAL HISTORY RECORDS CHECK AND A 3-5 DAY WAITING PERIOD.

>> ON, ON -- AS TO GUN-RELATED ISSUES, YES.

I'M SPEAKING MORE BROADLY AS TO THE STRUCTURE OF COUNTY GOVERNMENT AND THE STRUCTURE OF MUNICIPAL GOVERNMENT.

>> THAT SPECIFIC ISSUE, THE TRIAL COURT HELD THAT IT WAS NO PROBLEM, HAD NO PROBLEM WITH THE CONFLICT WITH THE STATUTE AND HELD IT TO BE THE VALID --

>> CORRECT.

>> THIS APPEAL RELATES TO THAT SPECIFIC PROVISION NOT AT ALL, RIGHT?

>> CORRECT, BECAUSE THAT'S WHAT THE TRIAL COURT CORRECTLY CONCLUDED.

IT'S IN THE CONSTITUTION.

THE STATE DIDN'T DISPUTE THAT ISSUE, DIDN'T APPEAL ANY RULING ON THAT.

SO THAT'S NOT HERE.

THAT'S NOT BEFORE THIS COURT.

>> OKAY.

>> IF, IF THE -- WELL, I SEE I HAVE FOUR MINUTES.

LET ME TURN BRIEFLY TO GOVERNMENTAL FUNCTION.

FOR DECADES THIS COURT HAS  
RECOGNIZED THAT LOCAL  
GOVERNMENTS ENJOY IMMUNITY FROM  
LIABILITY FOR CERTAIN DECISIONS  
THAT CONSTITUTE FUNDAMENTAL  
DISCRETIONARY FUNCTIONS OF  
GOVERNANCE AT THE LOCAL ARE  
LEVEL.

AND, IN FACT, THE STATE HAS  
CONCEDED, HAS ACKNOWLEDGED THAT  
THAT IMMUNITY IS A NONWAIVABLE  
ONE.

THAT WAS THE COURT'S RULING IN  
COMMERCIAL CARRIER, THAT NOT  
WITHSTANDING 768.28 WHICH  
DOESN'T ADDRESS, THERE WERE  
CERTAIN FUNDAMENTAL GOVERNANCE  
DECISIONS THAT WERE BEYOND WITH  
THE SCOPE OF THE JUDICIARY TO  
REVIEW.

AND THERE IS NO MORE  
QUINTESSENTIAL DISCRETIONARY  
FUNCTION THAN THE ENACTMENT OF  
LEGISLATION.

AND THE STATUTE ITSELF IMPOSES  
UNDER SECTION 3F FOR THE MERE  
PROMULGATION OF LEGISLATION --  
>> DOESN'T THAT ARGUMENT PROVE  
TOO MUCH?

BECAUSE WHAT YOU'VE SAID JUST  
NOW IS THERE'S NO MORE CENTRAL  
FUNCTION THAN THE PASSAGE OF  
LEGISLATION.

OKAY.

THE PASSAGE OF ANY LEGISLATION?  
I MEAN, ISN'T THE NARROWER  
QUESTION POSED BY IN THE CASE  
THE PASSAGE OF LEGISLATION MANY  
A FIELD THAT THE LEGISLATURE HAS  
PURPORTED EXPRESSLY TO OCCUPY,  
LIKE THAT DOESN'T SEEM TO BE A  
CORE FUNCTION.

I WOULD AGREE WITH YOU THAT A  
CORE FUNCTION OF MUNICIPAL  
GOVERNMENT SO THE PASS ZONING  
ORDINANCES OR HYGIENE ORDINANCES  
OR SPEEDING OR WHATEVER.

THOSE ARE THINGS THAT I THINK  
COMMONLY PEOPLE EXPECT HAIR THE  
MUNICIPALITIES TO DO.

HOW IS IT A CORE MUNICIPAL  
FUNCTION TO OCCUPY A FIELD THAT  
THE STATE HAS EXPRESSLY STATED  
THAT IT MEANS TO PREEMPT?

HOW'S THAT THAT A CORE CITY  
FUNCTION?

>> THERE ARE TWO SEPARATE --  
THERE ARE THE TWO COMPONENTS IN  
ANSWER TO YOUR QUESTION,  
JUSTICE.

THE FIRST ONE TURNS ON THE  
FOUR-PART COMMERCIAL CARRIER  
TEST, THE FOUR-PRONG TEST.  
AND THE FOURTH PRONG WHICH IS  
THE ONLY PRONG IF THAT THE  
PARTIES IN DISAGREES ABOUT IS  
THE QUESTION OF WHETHER OR NOT  
THE ACT OR OMISSION OR DECISION  
IN QUESTION IS WITHIN THE  
AUTHORITY OF THE INDIVIDUAL OR  
ENTITY THAT TOOK THE ACTION.  
AND THE STATE POSITS THAT THE  
QUESTION SHOULD BE ASKED IN  
TERMS THAT ASSUMES THE ANSWER  
WHICH IS, IN OTHER WORDS, DO YOU  
HAVE THE AUTHORITY TO ENACT AN  
ORDINANCE THAT'S PREEMPTED.  
IF YOU ASK THE QUESTION THAT  
WAY, THE ANSWER WILL ALWAYS BE  
NO.

IF YOU PRESUPPOSE THE NEGATIVE  
INTO THE QUESTION, IT BECOMES A  
MEANINGLESS TEST.  
AND, IN FACT, IF YOU LOOK AT THE  
HISTORY OF THE COURT AND HOW IT  
HAS APPLIED THAT FOUR-PART TEST  
AND THE FOURTH PRONG, IT HAS  
ELEVATED THE QUESTION TO A MUCH  
HIGHER LEVEL.

IN OTHER WORDS, DO LOCAL  
GOVERNMENTS HAVE THE AUTHORITY  
TO ENACT ORDINANCES, TO ENACT  
LEGISLATION?

AND THE STATE CONCEDES,  
OBVIOUSLY, THEY DO.

SO WE CAN'T REALLY ABIDE BY THE  
FOUR-PART IN COMMERCIAL CARRIER  
AND ASK THE QUESTION THE WAY YOU  
SUGGESTED, YOUR HONOR.

THAT'S BECAUSE IT ASSUMES THE  
ANSWER.

IT ASSUMES THE ANSWER.

>> WELL, OKAY.

SO LET'S TRY NOT ASSUMING THE  
ANSWER.

THE CITY OF CORAL GABLES WHERE I  
LIVE AND THE CITY OF KEY LARGO  
DECIDES THAT IT'S GOING TO PASS

A LOCAL ORDINANCE FUNDING  
MILITARY AID TO UKRAINE.  
AND THE FEDERAL GOVERNMENT SAYS  
THAT'S KIND OF OUTSIDE YOUR  
SCOPE, CORAL GABLES, KEY LARGO.  
THANKS, BUT YOU HAVE NO POWER TO  
APPROPRIATE.

I HAVEN'T PRESUPPOSED AN ANSWER,  
BUT WHAT I'M, WHAT I'M TRYING TO  
GET AN ANSWER TO IS THAT'S NOT A  
CORE LEGISLATIVE, THAT'S NOT A  
CORE MUNICIPAL FUNCTION BECAUSE  
OF THE SUBJECT MATTER OF THE  
LAW, RIGHT?

>> LET ME SEE IF I CAN NARROW  
IT.

FIRST OF ALL, WITH RESPECT TO  
THE EXAMPLE THAT YOU GAVE OF THE  
FEDERAL GOVERNMENT, THE FEDERAL  
GOVERNMENT, FRANKLY, DOESN'T  
CARE ABOUT THE DYNAMICS OF LOCAL  
GOVERNMENT.

>> SO PICK ANOTHER ONE, ANY ONE  
YOU WANT.

>> I'M GOING TO PROFFER AN  
EXAMPLE.

>> GO AHEAD.

>> 790.33 SPECIFICALLY CREATES  
AN EXEMPTION THAT ALLOWS A LOCAL  
GOVERNMENT TO ENACT ZONING  
ORDINANCES, ALL RIGHT?

LET'S ASSUME CORAL GABLES, TO  
PICK YOUR HOMETOWN, ENACTS AN  
ORDINANCE THAT SAYS THERE SHALL  
BE NO GUN SALES, NO GUN SHOPS,  
THERE'LL BE NO GUN RANGES,  
NOTHING WITHIN 500 FEET OF A  
SCHOOL.

AND ALONG WITH GUN SALES THEY  
ALSO HAVE THERE WILL BE NO  
LIQUOR SALES, THERE ARE A NUMBER  
OF BUSINESSES THAT ARE EXCLUDED  
FROM WITHIN THAT ZONE, ALL  
RIGHT?

IT'S SPECIFICALLY CONTEMPLATED  
THAT THE LOCAL GOVERNMENT CAN  
LEGISLATE IN THAT FIELD.

IT IS BY VIRTUE OF THAT FACT, IT  
IS A DISCRETIONARY DECISION TO  
DECIDE TO ENACT THAT  
LEGISLATION.

BUT IF THAT ORDINANCE IS ENACTED  
AND SOMEBODY CHALLENGES THE  
ORDINANCE AND IT IS SUBSEQUENTLY

FOUND TO BE THE PREEMPTED  
BECAUSE SOMEHOW THERE'S EVIDENCE  
THAT THE DESIGN OR PURPOSE OF  
THE ORDINANCE WAS TO RESTRICT  
SALES OR INTERFERE WITH GUN  
OWNERSHIP OR SOMETHING LIKE  
THAT, THEN IT'S AUTOMATIC,  
AUTOMATICALLY EXPOSED TO DAMAGES  
FOR A WHOLLY DISCRETIONARY --

>> I CAN LET YOU KEEP GOING --

>> AND I APOLOGIZE, I'VE GONE  
OVER MY TIME.

>> YOU HAVE EXHAUSTED ALL  
YOUR --

>> I HAVE.

>> I WILL, NONETHELESS, GIVE YOU  
4 MINUTES --

>> I ACTUALLY EXHAUSTED THE 20  
THE NOT JUST 16?

I APOLOGIZE, YOUR HONOR.

THANK YOU.

>> MR. CHIEF JUSTICE AND MAY IT  
PLEASE THE COURT, I'LL START  
WITH LEGISLATIVE IMMUNITY WHICH  
PLAINTIFFS ARGUE IS NOT A COMMON  
LAW DEFENSE, BUT A  
CONSTITUTIONAL RULE THAT THAT  
BARS THE LEGISLATURE FROM  
ENFORCING ITS PREEMPTION  
STATUTES BY HOLDING LOCAL  
OFFICIALS ACCOUNTABLE EVEN WHERE  
THEY KNOWINGLY AND WILLFULLY  
ENACT PREEMPTED ORDINANCES.  
THE STARTING POINT OF IN THE  
ANALYSIS IS THAT, UNLIKE  
CONGRESS WHICH IS A GOVERNMENT  
OF ENUMERATED POWERS, THE STATE  
LEGISLATURE HAS THE AUTHORITY TO  
LEGISLATE IN ANY AREA NOT  
PROHIBITED TO IT LIKE SPEECH OR  
RELIGION.

SO IT'S THE PLAINTIFFS' BURDEN  
TO IDENTIFY A PROVISION OF THE  
CONSTITUTION THAT RESTRICTS THE  
LEGISLATURE'S POWER TO ADOPT  
PENALTIES LIKE THIS.

AND THERE SIMPLY ISN'T ONE.

PLAINTIFFS' FIRST POINT TO  
ARTICLE VIII OF THE CONSTITUTION  
FOR ITS GRANT OF DEFAULT HOME  
RULE POWERS TO LOCAL OFFICIALS,  
AND THEY COUPLE THAT WITH U.S.  
SUPREME COURT DECISIONS THAT  
EMPHASIZE THE IMPORTANCE OF THE

IMMUNITY FOR THOSE WHO EXERCISE LEGISLATIVE POWER. BUT PLAINTIFFS HAVE IT BACKWARD. THEIR LEAD CASE, YOU KNOW, BOGDEN V. SCOTT IS HARRIS, HOLDS ONLY THAT THE CONGRESS INTENDED IN THE ENACTMENT OF SECTION 1983 TO MAINTAIN A COMMON LAW, COMMON LAW IMMUNITY.

IN 790.33, BY CONTRAST, THE LEGISLATURE CLEARLY ABROGATED THE IMMUNITY BY CREATING PENALTIES FOR OFFICIALS WHO ENACT PREEMPTED ORDINANCE. AND AGAINST THAT BACKDROP, THE FACT THAT ARTICLE VIII BY DEFAULT GIVES LOCAL GOVERNMENTS SOME FORM OF LEGISLATIVE THE POWER SIMPLY PUTS THOSE OFFICIALS IN THE SAME POSITION AS THE LOCAL OFFICIALS IN BOGDEN WHICH IS TO SAY THEY HAVE THIS COMMON LAW IMMUNITY, BUT IT CAN BE TAKEN AWAY BY A HIGHER POWER. HERE, THE STATE LEGISLATURE.

AND REALLY TO THE EXTENT THAT ARTICLE VIII SPEAKS TO THIS ISSUE AT ALL, IT DOES SO BY ESTABLISHING A CONSTITUTIONAL HIERARCHY.

IT SAYS THAT LOCAL OFFICIALS HAVE ONLY THOSE POWERS THAT ARE NOT INCONSISTENT WITH GENERAL LAW MEANING THEY'RE SUBJECT TO THE PLENARY CONTROL OF THE LEGISLATURE.

AND WITH THAT HIERARCHY ESTABLISHED, THERE'S NO REASON THE LEGISLATURE WOULDN'T BE ABLE TO PROVIDE PENALTIES FOR ITS STATUTE JUST LIKE ANY OTHER STATUTE.

THEY'VE ALSO POINTED TO THIS COURT'S DECISION OF THE LEAGUE OF WOMEN VOTERS, BUT THAT CASE SIMPLY RECOGNIZES THE PARALLEL BETWEEN THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION WHICH IS THAT THE JUST AS THE SPEECH OR DEBATE CLAUSE CLOTHES MEMBERS OF CONGRESS WITH IMMUNITY FOR THEIR LEGISLATIVE ACTS, ARTICLE II, SECTION 3 OF FLORIDA'S

CONSTITUTION CLOTHES MEMBERS OF  
THE FLORIDA LEGISLATURE FOR  
THEIR ACTS.

THE CASE SAYS NOTHING ABOUT  
LOCAL OFFICIALS, OF COURSE,  
BECAUSE ARTICLE II SECTION 3  
REQUIRES THE SEPARATION OF  
POWERS ONLY BETWEEN THE BRANCHES  
OF STATE GOVERNMENT.

AS I UNDERSTAND THE ARGUMENT ON  
THIS POINT, IT'S THAT ARTICLE  
II, SECTION 3 LIMITS EACH BRANCH  
ONLY ITS ASSIGNED POWERS, AND  
THAT'S, OF COURSE, CORRECT.  
MEANING THE JUDICIARY MAY  
EXERCISE ONLY POWERS THAT ARE  
JUDICIAL MANY NATURE.

THE PROBLEM WITH THE ARGUMENT IS  
THAT LEGISLATIVE IMMUNITY IS NOT  
A QUESTION OF JEWISH ADDITIONAL  
POWER.

IT'S THE TRADITIONAL DEFENSE  
AMONG OTHER THINGS WELL  
ESTABLISHED THAT IT'S WAIVABLE,  
IT DOESN'T GO TO THE COURT'S  
SUBJECT MATTER JURISDICTION.

I MEAN, YOU CAN CONTRAST THAT  
WITH THE POLITICAL QUESTION  
DOCTRINE WHICH I'LL GET TO IN A  
MINUTE.

IN THE CITIZENS FOR STRONG  
SCHOOLS CASE, IT WAS OUTSIDE OF  
SCOPE OF THE JUDICIAL POWER TO  
DETERMINE THE ADEQUACY OF A  
PARTICULAR LEVEL OF  
APPROPRIATION BECAUSE THAT'S  
JUST A TOOLKIT THAT THE COURTS  
DON'T HAVE.

WE JUST DON'T HAVE THE SAME  
THING WITH LEGISLATIVE THE  
IMMUNITY BECAUSE DETERMINING  
INTENT AND DAMAGES ARE  
TRADITIONAL JUDICIAL FUNCTIONS.

>> HOW DOES THE KNOWING AND  
WILLFUL PROVISION WORK IN  
PRACTICE?

HOW WOULD IT?

>> YEAH.

SO, YOUR HONOR, WE INTERPRET THE  
STATUTE TO LIMIT THE FINES  
PROVISIONALLY TO JUST THOSE  
OFFICIALS WHO KNOW THE ORDINANCE  
THEY ENACT WOULD BE PREEMPTED  
WHICH WE TAKE TO MEAN A

SUBSTANTIAL DEGREE OF CERTAINTY THAT IT WOULD BE.  
TURNING TO DISCRETIONARY FUNCTION IMMUNITY, THIS COURT WAS CLEAR IN WALLACE V. DEAN THAT FLORIDA'S DISCRETIONARY IMMUNITY FUNCTION DOCTRINE WAS JUST AN APPLICATION OF THE POLITICAL QUESTION DOCTRINE AS APPLIED IN COMMON LAW CASES. WE'RE NOT CHALLENGING WALLACE. THE DISCRETIONARY FRAMEWORK MAY WELL, YOU KNOW, OPERATE PROPERLY IN COMMON LAW TORT THE CASES. WE'RE SIMPLY ASKING THE COURT TO MAKE CLEAR THAT IT DOESN'T STAND IN THE WAY OF STATUTORY ENFORCEMENT ACTIONS LIKE PREEMPTION SUITS. WHETHER WE CALL IN THE A POLITICAL QUESTION, THE KEY POINT IS THAT COMMON LAW TORT SUITS ALLEGE UNREASONABLENESS AND PREEMPTION SUITS LIKE THIS DO NOT. TO ILLUSTRATE THE POINT, CONSIDER A PLAN TO SUE DUE TO A NEGATIVELY INSTALLED TRAFFIC LIGHT. THE FACT FINDER CAN ASSESS NEGLIGENCE WITHOUT A PROBLEM IN A CASE LIKE THAT BECAUSE THERE'S A STANDARD OF CARE FOR HOW TO THE INSTALL A TRAFFIC LIGHT. BUT CONTRAST THAT WITH AN EXAMPLE WHERE THERE IS NO TRAFFIC LIGHT AT ALL, AND THE ALLEGATION IS THAT THE STATE WAS NEGLIGENT FOR NOT APPROPRIATING MONEY TO PAY FOR ONE, RIGHT? IN THAT CASE THE COURT WOULD HAVE NO STANDARD FOR AN APPROPRIATION, RIGHT? SO THAT'S BASICALLY THE CITIZENS FOR STRONG SCHOOLS' CASE. NOW CONTRAST THAT IN TURN WITH 790.33. PREEMPTION PROVISION SUPPLIES THE JUDICIALLY MANAGEABLE STANDARD. THE COURT DOESN'T HAVE TO SECOND GUESS WHETHER A CHALLENGED ORDINANCE IS REASONABLE AS A REGULATION OF FIREARMS.

IT JUST HAS TO ASK WHETHER IT IS  
A REGULATION OF FIREARMS.

THAT'S JUST STATUTORY  
INTERPRETATION --

>> ARE YOU SAYING IF YOU HAD A  
STATUTE THAT EXPLICITLY  
PURPORTED TO WAIVE OR TAKE AWAY  
ANY KIND OF IMMUNITY THAT A  
LOCAL GOVERNMENT WOULD HAVE FOR  
A DISCRETIONARY FUNCTION, THAT  
IT WOULD BE ESSENTIALLY  
NONJUSTICIABLE IF SOMEBODY  
ACTUALLY SUED UNDER THAT BECAUSE  
OF THE DOCTRINE?

>> I TAKE YOUR HONOR'S QUESTION,  
SO 790.33 PROHIBITS ONLY THE  
UNREASONABLE REGULATION OF  
FIREARMS, I THINK WE'D HAVE A  
VERY DIFFERENT QUESTION BECAUSE  
NO COURT IS GOING TO HAVE A  
STANDARD AGAINST WHICH TO ASSESS  
WHETHER A FIREARMS REGULATION IS  
REASONABLE OR NOT.

THAT'S REALLY EXACTLY THE SAME  
PROBLEM IT WAS IN CITIZENS FOR  
STRONG SCHOOLS CASE.  
BUT THAT'S, OF COURSE, NOT WHAT  
WE HAVE.

ALL WE HAVE IS A BASIC  
PREEMPTION STATUTE THAT ASKS THE  
COURT TO ENGAGE IN STATUTORY THE  
INTERPRETATION, ASK WHETHER THE  
ORDINANCE BEFORE IT IS A  
REGULATION OF FIREARMS AND  
APPLIES FROM THE ENUMERATED  
EXCEPTIONS, AND THIS IS THE  
STUFF OF QUINTESSENTIAL JUDICIAL  
DECISION MAKING.

AND REALLY THE FACT THAT  
STATUTORY INTERPRETATION IS A  
BASIC JUDICIAL FUNCTION IS  
EXACTLY WHY PREEMPTING STATUTES  
CATEGORICALLY DO NOT POSE A  
POLITICAL QUESTION PROBLEM.  
I THINK THEIR ONLY BEEF IS WITH  
THE DAMAGES REMEDIED.  
AND THAT FARES NO BETTER BECAUSE  
THE ASSESSMENT OF DAMAGES IS  
ALSO SECOND NATURE TO THE  
COURTS.

IF THE COURT HAS NO QUESTIONS,  
WE'LL REST ON OUR BRIEF.

>> MY FRIEND SUGGESTS THAT  
COURTS HAVE ALWAYS MADE

INQUIRIES INTO INTENT AND MOTIVATION, BUT RESPECTFULLY, I DON'T THINK COURTS HAVE EVER ENGAGED IN EXAMINATIONS OF INTENT OR MOTIVATION WHEN IT COMES TO LEGISLATORS.

AND THAT'S THE JUST OF OUR ARTICLE II, SECTION 3 ARGUMENT AS TO LEGISLATIVE IMMUNITY, WHICH IS THAT IF THE LEGISLATURE WANTS TO CREATE A REMEDY, IT CAN'T DO SO BY THRUSTING THE JUDICIARY INTO A SCENARIO WHERE IT IS THE HAULING LEGISLATORS INTO COURT AND ASKING THEM WHY THEY VOTED, DID YOU KNOW -- WHAT DID YOU THINK WAS GOING TO HAPPEN WHEN YOU ENACTED THIS ORDINANCE.

THAT'S WHERE YOU END UP. THAT'S WHY THIS PARTICULAR REMEDY CANNOT STAND.

EVEN IF YOU GET PAST THE QUESTION OF STRIPPING AWAY LEGISLATIVE IMMUNITY FROM LEGISLATIVELY, CONSTITUTIONALLY LEGISLATIVELY AUTHORIZED BODIES --

>> WELL, THE NOTION THAT ANY ONE OF THESE PROSECUTIONS THEY WOULD BE HAULED IN, THEY DON'T HAVE TO TESTIFY.

THE STATE'S GOT TO PROVE IT, RIGHT?

>> I'M NOT SURE HOW YOU COULD EVER ESTABLISH -- THIS IS NOT A CRIMINAL PENALTY, IT'S A CIVIL PERSONALITY.

THERE'S NO RIGHT OF SELF-INCRIMINATION HERE.

>> BUT THE BURDEN IS STILL ON THE PLAINTIFF TO PROVE IT, CORRECT?

>> CORRECT.

AND THEY WOULD GET TO DEPOSE THE LOCAL ELECTED OFFICIAL AND START ASKING THEM THESE QUESTIONS, AND YOU END UP IN THE EXACT SAME PLACE.

IT'S -- I DON'T KNOW HOW YOU CAN AVOID THAT THAT PROBLEM. I THINK THAT'S AN INHERENT DEFECT IN THIS REMEDY.

>> IT JUST SEEMS LIKE -- SORRY

TO INTERRUPT YOU.  
IT JUST SEEMS LIKE AT THE END OF  
THE DAY YOU MAKE A VERY  
PLAUSIBLE KIND OF POLICY  
ARGUMENT, BUT IT JUST COUNT SEEM  
LIKE THERE'S ANY SORT OF  
CONSTITUTIONAL FOUNDATION FOR  
WHAT YOU'RE TALKING ABOUT.

>> WELL, I THINK, FIRST OF ALL,  
OUR CONSTITUTIONAL FOUNDATION  
ADMITTEDLY IS ARTICLE VIII,  
SECTION 1 AND 2.

AND IF THE COURT DOESN'T BELIEVE  
THAT LEGISLATIVE THE IMMUNITY IS  
INHERENT IN BEING CONFERRED  
LEGISLATIVE THE POWER, THEN  
OBVIOUSLY --

>> I MEAN, I MEAN, I DON'T KNOW  
IF BY THAT YOU MEAN IT'S KIND OF  
A BASELINE AGAINST WHICH THE  
LEGISLATURE WOULD SORT OF  
LEGISLATE, BUT IF THE WILL  
LEGISLATURE CONSCIOUSLY CHOOSES  
TO TAKE THAT AWAY IN THIS  
CONTEXT, THEN, YOU KNOW, YOU'RE  
LEFT WITH A POLICY ARGUMENT.

>> WELL, NO, I'M NOT, BECAUSE  
THEN WE GET TO THE SECONDARY  
ARGUMENT OF WHETHER OR NOT THE  
LEGISLATURE CAN, IN THE PROCESS  
OF PROVIDING THIS REMEDY, EXPAND  
THE POWER OF JUDICIARY.

BECAUSE LEGISLATIVE IMMUNITY  
ASIDE, THIS COURT HAS NEVER  
COURTENANCED THE IDEA THAT THE  
JUDICIARY MAY MAKE THESE KINDS  
OF INQUIRIES OF LEGISLATORS.  
SO I HAVE ONE MINUTE, AND I  
APOLOGIZE, JUSTICE MUNIZ, I DO  
WANT TO TACKLE A COUPLE OF THE  
COMMENTS THAT WERE MADE WITH  
RESPECT TO GOVERNMENTAL FUNCTION  
IMMUNITY.

AND IT BRINGS ME BACK TO THE  
EXAMPLE THAT I OFFERED TO  
JUSTICE COURIEL REGARDING THE  
ZONING ARGUMENTS.

ALL THE COURTS HAVE TO DO IS  
MAKE A QUICK DETERMINE THE  
NATION AS TO WHO IT'S PREEMPTED.  
THE SECTION WHICH AUTHORIZES THE  
LOCAL GOVERNMENT TO ENACT A  
ZONING ORDINANCE SO LONG AS IT  
IS NOT DESIGNED FOR THE PURPOSE

OF RESTRICTING OR PROHIBITING  
SALE, THAT IS HARDLY A  
NONPOLITICAL QUESTION.  
THAT IS, THAT IS THE HEIGHT OF  
ENTANGLEMENT WITH THE JUDICIARY  
NOW COMING IN AND SAYING, WELL,  
LET'S FIND OUT WHETHER OR NOT --  
WHAT WAS THE REASON WHY YOU WERE  
ENACTING THE ZONING ORDINANCE?  
WAS IT DESIGNED TO THWART THE  
SALE OF GUNS, OR WAS IT DESIGN  
TO PROTECT CHILDREN, YOU KNOW,  
FROM HAVING THESE VENDORS WITHIN  
500 FEET?

IT IS NOT THE BLACK AND WHITE  
SCENARIO THAT THE STATE IS  
SUGGESTING.

AND LASTLY, WITH MY REMAINING  
TWO SECONDS, THE DISTINCTION  
BETWEEN TORT AND STATUTORY  
REMEDY, I THINK, WAS LAID TO  
REST BY THIS COURT IN THE  
WALLACE.

BECAUSE IN WALLACE AS IT  
EXAMINED THE TWO-PART PROCESS,  
WHEN IT ASKS FIRST IS THERE THE  
A DUTY OF CARE THAT EXISTS THAT  
TRIGGERS THE GOVERNMENTAL  
FUNCTION IMMUNITY, THE COURT  
NOTED THAT THE DUTY CAN ARISE  
EITHER FROM THE COMMON LAW OR  
FROM THE A STATUTE.

AND WE RESPECTFULLY SUGGEST THAT  
IN THIS CASE IN THE STATUTE  
CREATES ITS DUTY, CREATES THE  
STANDARD OF WHAT IS REASONABLE,  
CAN YOU ENACT THIS ORDINANCE IF  
OR NOT.

SO WE RESPECTFULLY REQUEST THAT  
THE COURT QUASH THE DECISION OF  
THE FIRST DISTRICT COURT OF  
APPEAL AND REMAND FOR FURTHER  
PROCEEDINGS.

THANK YOU FOR YOUR TIME.

>> THANK YOU, COUNSEL.

WE THANK YOU BOTH FOR YOUR  
ARGUMENTS IN THIS CASE.